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In The
Supreme Court of the United States
October Term, 1989

THE STATES OF KANSAS AND MISSOURI,
AS PARENS PATRIAE,

v. *Petitioners,*

THE KANSAS POWER & LIGHT COMPANY
and
UTILICORP UNITED, INC.,

Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Tenth Circuit

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

1. Do residential indirect purchasers of natural gas, represented *parens patriae* by their state attorneys general, have standing to sue under Section 4 of the Clayton Act, where there is an easily-proved, 100% pass-on of illegal overcharges, effected by federal and state regulation rather than by a fixed-quantity cost-plus contract?

2. Where federal and state regulations require that the full amount of any illegal overcharge be passed on by the direct purchaser in readily-identifiable form, is there an exception to the general rule barring indirect purchaser antitrust suits under Section 4 of the Clayton Act?

PARTIES

Petitioners, the States of Missouri and Kansas, acting as *parens patriae* on behalf of their residential gas consumers, are two of the six plaintiffs in consolidated litigation known as *In re Wyoming Tight Sands Antitrust Cases*. The States were appellants in the Tenth Circuit proceeding from which this petition arises.

Appellees in the Tenth Circuit included plaintiff The Kansas Power & Light Company ("KPL"), intervenor UtiliCorp United, Inc. ("UtiliCorp," which includes its two subsidiaries, Missouri Public Service Company and Kansas Public Service Company), and plaintiff Kansas Gas & Electric Company ("KG&E"). Plaintiff Farmland Industries, Inc. did not take part in the Tenth Circuit appeal. Because the issues raised in this case do not affect KG&E¹ or Farmland, only KPL and UtiliCorp are named as respondents herein.

Defendants below were Amoco Production Company ("Amoco"), Cities Service Oil & Gas Corporation ("Cities Service"), CSG Exploration Company ("CSGE"), Williams Natural Gas Company ("Pipeline") and two limited partnerships, Moxa Limited Partnership and Wamsutter Limited Partnership. Amoco, Cities Service and CSGE intervened at the Tenth Circuit, but did not take a position as to which group of plaintiffs should prevail. The other defendants did not appear in the Tenth Circuit. None of the defendants is named as a respondent herein.

¹ Plaintiff Kansas Gas & Electric is solely an electric utility that does not resell gas. The States did not oppose KG&E's motion for partial summary judgment.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 866 F.2d 1286. The opinion of the district court (Pet. App. A22-A39) is reported at 695 F. Supp. 1109. The district court's opinion on the motion for certification (Pet. App. A40-A42) is reported at 695 F. Supp. 1119.

JURISDICTION

The judgment of the court of appeals (Pet. App. A20-A21) was entered on January 31, 1989, and a petition for rehearing was denied on March 27, 1989 (Pet. App. A18-A19). A petition for a writ of certiorari was filed on June 26, 1989 (J.A. 7). The petition was granted on January 16, 1990 (*id.*). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THE CASE

Section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. § 15(a) (1982), provides in pertinent part:

[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Title III of The Hart-Scott-Rodino Antitrust Improvements Act of 1976 provides in pertinent part:

Any attorney general of a State may bring a civil action in the name of such State, as *parens patriae* on behalf of natural persons residing in such State, in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of sections 1 to 7 of this title. The court shall exclude from the amount of monetary relief awarded in any such

action any amount of monetary relief (A) which duplicates amounts which have been awarded for the same injury, or (B) which is properly allocable to (i) natural persons who have excluded their claims pursuant to subsection (b)(2) of this section, and (ii) any business entity.

90 Stat. 1394, 15 U.S.C. § 15c(a)(1) (1982).

* * *

In any action under section 15c(a)(1) of this title, in which there has been a determination that a defendant agreed to fix prices in violation of sections 1 to 7 of this title, damages may be proved and assessed in the aggregate by statistical or sampling methods, by the computation of illegal overcharges, or by such other reasonable system of estimating aggregate damages as the court in its discretion may permit without the necessity of separately proving the individual claim of, or amount of damage to, persons on whose behalf the suit was brought.

90 Stat. 1395, 15 U.S.C. § 15d (1982).

* * *

Monetary relief recovered in an action under section 15c(a)(1) of this title shall -

(1) be distributed in such manner as the district court in its discretion may authorize; or

(2) be deemed a civil penalty by the court and deposited with the State as general revenues; subject in either case to the requirement that any distribution procedure adopted afford each person a reasonable opportunity to secure his appropriate portion of the net monetary relief.

90 Stat. 1395, 15 U.S.C. § 15e (1982).

STATEMENT OF THE CASE

A. Background

In 1984, 1985 and 1986, the Attorneys General for the petitioners States of Kansas and Missouri ("the States") and three utilities filed complaints charging defendant Williams Natural Gas Company ("Pipeline") and others with selling natural gas at artificially inflated prices. Doc. No. 1,² Case No. 85-2364-S, Kansas Complaint; Doc. No. 1, Case No. 86-2351-S, Missouri Complaint.³ The inflated prices, plaintiffs allege, were the result of a price-fixing conspiracy and other anticompetitive behavior involving Pipeline, its then-parent Cities Service Company, CSG Exploration, Amoco and two limited partnerships. The general background of the conspiracy is described in *Midwest Gas Users Association v. FERC*, 833 F.2d 341 (D.C. Cir. 1987).

The price-fixed gas was produced in Wyoming, then transported by Pipeline and sold to KPL, UtiliCorp and other utilities in Missouri and Kansas.⁴ The utilities

² References to "Doc. No. ____" are to the list of relevant docket entries in the Joint Appendix.

³ The States' complaints contain two types of claims against the defendants under state and federal law: claims on behalf of state agencies, municipalities and other political subdivisions, and *parens patriae* claims under 15 U.S.C. § 15c on behalf of indirect-purchaser residential consumers of natural gas. Only the *parens patriae* claims are before this Court.

⁴ KPL and UtiliCorp are two of more than 50 gas utilities operating as regulated monopolies within defined service areas in Kansas and Missouri. Other non-party utilities provide natural gas purchased from the conspirators to over 50,000 Kansas residential consumers. The claims of these residential users will be lost if the Attorneys General cannot represent them in their *parens patriae* capacity.

resold the gas to various consumers, including individual residents of the two states. These gas sales occurred under a regulatory system that required *all* gas costs to be passed on by the Pipeline, through the utilities, to the end-use consumers.⁵ This regulatory pass-through mechanism is *mandatory*; at no level of distribution is there any discretion to absorb or modify any increase in the cost of gas. Exhibit D to Doc. No. 485.

The effect of this pass-through on the cost of gas to consumers is easy to determine – the utilities make public filings showing the volume and price of gas sold to each customer category, including residential consumers. Exhibit K to Doc. No. 485. Further, the passed-on prices are reflected as a separate identifiable entry on each residential consumer's monthly gas bill from the utilities.

⁵ This regulatory mechanism operates first at the federal level, where the Pipeline is regulated by the Federal Energy Regulatory Commission (FERC), pursuant to the Natural Gas Act, 15 U.S.C. §§ 717 *et seq.* (1982) (NGA), and the Natural Gas Policy Act, 15 U.S.C. §§ 3301 *et seq.* (1982) (NGPA). Under the NGA, Pipeline must adjust its rates semiannually to reflect any changes in the price of gas paid to producers by Pipeline, in accordance with Purchased Gas Adjustment (PGA) clauses in Pipeline's tariff. 15 U.S.C. § 717(d), (e); see 18 C.F.R. §§ 154.1 *et seq.* (1988).

At the state level, utilities such as KPL and UtiliCorp are regulated by the Missouri Public Service Commission and the Kansas Corporation Commission. See Mo. Rev. Stat. §§ 386.250 (5), 393.140(1), 393.270(2) (1986 & Supp. 1989); Kan. Stat. Ann. §§ 66-1,201, 66-1,206 (1985 & Supp. 1989). Both state commissions enforce PGA clauses in the utilities' tariffs. UtiliCorp's Kansas Public Service subsidiary operated under a PGA clause in a locally-enforced municipal ordinance. These PGAs require that KPL and UtiliCorp automatically pass on to their customers the utilities' entire wholesale cost of gas from the Pipeline.

This separate entry (entitled "Wholesale Gas Cost" on KPL's bills) is defined as the amount per customer "for the cost of gas to [KPL]." Appendix H to Doc. No. 474. The amount of any overcharge to the residential consumer is thus the *same* as the amount of the overcharge to the utility, and KPL has recognized as much. See pp. 13-14, *infra*; Exhibit D to Doc. No. 485, pp. 2-3.

The Tenth Circuit, recognizing the effect of this regulatory system, assumed for purposes of its decision "that there was a perfect and provable pass-on of the allegedly illegal overcharge. . . ." Pet. App. A14.

B. Proceedings Below

The utilities, in motions for partial summary judgment, argued to the district court that they alone were the proper plaintiffs and that the States lacked standing to sue as *parens patriae* on behalf of the residential consumers because the consumers are indirect purchasers whose claims are barred by the rule of *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), and *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). Doc. Nos. 440, 448, 458; J.A. 8-9, 12.⁶ Although the utilities did not deny that they passed on all of the overcharges to the residential consumers, they argued that because they had

⁶ KPL's motion to strike or, in the alternative, for summary judgment, and its statement of uncontroverted facts, are printed in the Joint Appendix. In all relevant respects, the motions and statements of fact filed by UtiliCorp and KG&E are identical. See Doc. Nos. 439, 440, 458, 460.

no fixed-quantity contracts with these consumers, no exception to the direct-purchaser rule applied. *Id.* Petitioners countered that because state and federal regulation resulted in an easily-provable and perfect pass-through of all illegal overcharges, they had standing to sue under the *Illinois Brick* exception. Doc. Nos. 474, 485. The district court granted summary judgment in favor of the utilities, holding that even proof of a perfect pass-on would not give the States standing, because there were no "fixed-quantity contracts." Pet. App. A33-34.

On interlocutory appeal, the Tenth Circuit affirmed the district court's dismissal of the States' *parens patriae* claims. While recognizing that "there might be" an exception to the *Hanover Shoe* and *Illinois Brick* rule that only direct purchasers have standing to sue, Pet. App. A7-A8, the Tenth Circuit found no exception applicable here. Even though it assumed a perfect pass-through of damages to the consumer, *id.* at A14, the court narrowly interpreted *Illinois Brick* as requiring any exception to the direct-purchaser rule to be based on a pre-existing, cost-plus contract for a fixed quantity. *Id.* at A8. The court of appeals held that no "fixed-quantity contract" was present in this case: "To say that the utilities have a cost-plus fixed fee contract for a fixed quantity with their residential consumers would amount to fitting a square peg into a round hole. There exists no contract between the utilities and their residential consumers for any particular quantity." *Id.* at A12.

The court concluded that even considering proof of a perfect pass-on would "entail the very problems that the *Hanover Shoe* rule was meant to avoid." *Id.* at [431 U.S.]

744-45. We therefore hold that the amount of illegal overcharges actually passed on by the utilities to its [sic] customers is not an issue of material fact necessary to a resolution of the narrow issue before this court." Pet. App. A17.

The Tenth Circuit also concluded that this Court's decision in *Illinois Brick* limited *parens patriae* authority under the Hart-Scott-Rodino Act, 15 U.S.C. § 15c, to direct-purchaser suits. Pet. App. A7 n.1.

The court thus affirmed the order of the district court dismissing the States' *parens patriae* actions. As matters now stand, the utilities will be entitled to recover for their own benefit all of the antitrust overcharges, even though these overcharges were fully passed on to the consumers.

SUMMARY OF THE ARGUMENT

The direct-purchaser rule of *Illinois Brick* should not apply here to bar the claims of residential consumers of natural gas. Not only do the present facts meet all this Court's concerns about allowing indirect purchasers to sue, they also fit squarely within the "cost-plus" exception to the rule already recognized by the Court.

This case cannot become the complex battle over apportionment of damages that the Court faced in *Illinois Brick*. Here the overcharges paid by the "middlemen" utilities were passed on in full to the consumers. Proving the amount of the overcharges borne by the consumers is straightforward - the utilities' public filings show the

aggregate price and volume of gas passed on to residential consumers.

The Court's concerns in *Illinois Brick* about finding parties with incentive to sue and encouraging compensation to injured parties are also satisfied by the present facts. The residential consumers, represented *parens patriae* by their state attorneys general, are best suited to recover the antitrust overcharges. The utilities clearly are not. If the utilities are able to recover all overcharges for their own benefit, the injured consumers will not be compensated. But if the utilities are required to turn over any recovered overcharges to the residential consumers, the utilities will lack incentive to prosecute this case vigorously to a conclusion. Only the state attorneys general have both a demonstrated incentive to sue and an interest in compensating the persons actually injured.

The present facts also satisfy the exception to the direct-purchaser rule previously suggested by the Court. The utilities' pricing scheme here is a classic "pre-existing cost-plus contract" under which one would expect all overcharges to be passed on to the indirect purchasers. Moreover, all overcharges here *were* passed on in their entirety.

There is a separate ground for allowing the instant *parens patriae* claims. The Hart-Scott-Rodino Antitrust Improvements Act of 1976 specifically authorizes such suits, without regard to whether state attorneys general are representing direct or indirect purchasers. In fact, the most likely use of the 1976 Act is on behalf of *indirect* purchasers such as the injured residential consumers in this case. Because *Illinois Brick* was not a *parens patriae*

case, this Court has not yet determined whether the Act specifically authorizes *parens* actions such as the present one on behalf of indirect purchasers.

The state attorneys general should be allowed to maintain the present case *parens patriae* on behalf of the parties who sustained the entire antitrust overcharge in easily-provable form – the residential consumers of natural gas.

ARGUMENT

I. RESIDENTIAL CONSUMERS OF NATURAL GAS SHOULD BE ALLOWED TO RECOVER ILLEGAL OVERCHARGES DIRECTLY FROM THE NATURAL GAS PRODUCERS AND PIPELINES THAT VIOLATED THE ANTITRUST LAWS WHERE THE "MIDDLEMEN" UTILITY COMPANIES WERE REQUIRED TO, AND DID, PASS ON THE FULL AMOUNT OF THE OVERCHARGES TO THE CONSUMERS.

This case presents a fundamental question: is the direct-purchaser limitation of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), completely without exception? Petitioners suggest that unless the Court reverses the judgment below, the answer to this question, for all practical purposes, is "yes." If the Tenth Circuit's result stands, the direct-purchaser rule will be extended to an irrational point where the logical plaintiffs – those who bore all antitrust overcharges – will have their claims dismissed.

Section 4 of the Clayton Act, 15 U.S.C. § 15, permits "any person who shall be injured in his business or

property by reason of anything forbidden in the antitrust laws" to maintain an action to recover treble damages. Despite this seemingly clear language, the Court in *Illinois Brick* decided on policy grounds generally to limit antitrust standing under Section 4 to direct purchasers, and to preclude suits by persons more remote in the distribution chain. Even though indirect purchasers might also suffer some injury, the Court reasoned, problems of proof, considerations of antitrust enforcement, and the risk of multiple recoveries all argued for a general rule allowing only direct purchasers to sue.

The Court in *Illinois Brick* also recognized, however, as it had earlier in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), that there might be cases where it would be unwise to limit antitrust recoveries only to direct purchasers. This is such a case. Here the utilities' tariffs required them to pass on the entire overcharge to their residential consumers, and the utilities did so. The attorneys general have now brought suit on behalf of their residential consumers to recover the overcharges that they, and they alone, sustained. It would turn *Illinois Brick* on its head to hold that under these circumstances the injured consumers must give way as plaintiffs to utilities that absorbed none of the overcharges.

A. The Complete Pass-On Of Overcharges In A Regulated Cost-Plus Setting Satisfies All The Court's Concerns In *Illinois Brick*.

The rationale for the *Illinois Brick* direct-purchaser rule does not exist in this case. Here the indirect

purchasers – the residential consumers – are the parties who bore the overcharge. The amount of that overcharge is easily shown from utility company filings. This suit will not be made appreciably more complicated by recognizing the consumers' claims. The utilities cannot simultaneously enforce the antitrust laws and ensure compensation to injured parties. The consumers can. Antitrust enforcement will be enhanced, not hindered, if the persons actually suffering injury are allowed to maintain this suit.

1. Overcharges Directly Passed On To Customers Of Regulated Utilities Are Easy To Prove.

This Court's primary concern in *Illinois Brick* was the potential for complicating, and ultimately frustrating, antitrust enforcement if all persons who conceivably suffer injury were allowed to sue in a given case. The Court suggested that allowing all indirect purchasers to sue might turn antitrust suits into large-scale battles over apportionment of damages:

Permitting the use of pass-on theories under § 4 essentially would transform treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge – from direct purchasers to middlemen to ultimate consumers. However appealing this attempt to allocate the overcharge might seem in theory, it would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness.

431 U.S. at 737.

The Court recently emphasized this desire for uncomplicated litigation in *California v. ARC America Corp.*, ___ U.S. ___, 109 S.Ct. 1661, 1666 n.6 (1989):

In *Illinois Brick*, the Court was concerned not merely that direct purchasers have sufficient incentive to bring suit under the antitrust laws, as the Court of Appeals asserted, but rather that at least some party have sufficient incentive to bring suit. Indeed, we implicitly recognized as much in noting that *indirect purchasers might be allowed to bring suit in cases in which it would be easy to prove the extent to which the overcharge was passed on to them.*

(Citation omitted) (emphasis added).

This case satisfies the Court's basic concern. It is easy for the residential consumers here to prove that the entire overcharge was passed on to them. These consumers, represented *parens patriae* by their attorneys general, have demonstrated ample incentive to sue.

There is no question that the plaintiff utility companies simply transferred the entire overcharge to their customers. In the words of KPL Vice-President and General Counsel David S. Black:

Essentially we [KPL] provide a transportation service, and have title to the gas for the few hours required to move it from the wellhead to the burner tip. As the cost of this gas changes, it is reflected in our customers' bills, through the operation of the purchased gas adjustment mechanism, penny for penny and dollar for dollar.⁷

⁷ Ex. D to Doc. No. 485, pp. 2-3. The regulatory mechanism operates the same way with respect to respondent UtiliCorp.

The injury was sustained by the utilities' customers, not the utilities themselves. As Mr. Black noted, the consumers "pay *all* of any increases in the cost of natural gas KPL must purchase to serve them." *Id.* at 1-2 (emphasis original).⁸

Therefore, unlike the situation in *Hanover Shoe* and *Illinois Brick*, there is no problem here in determining how the utilities set their prices. The present case has mandatory cost-plus pricing set out in public filings. Those filings clearly show the volume and price of gas sold to residential consumers. See Exhibit K to Doc. No. 485. The amount of damage incurred by residential consumers is easily shown by simply multiplying the aggregate overcharge by the percentage of gas sold to those consumers.⁹ This simple system reveals the direct pass-through of all overcharges. That pass-through is easy to prove: one need look no further than the utilities' public filings.

The fact that the utilities may have lost sales should not bar the residential consumers' claims. The consumers have no interest in, or claim to, the utilities' lost profits.¹⁰

⁸ For purposes of its decision, the Tenth Circuit assumed what was in fact the case – a 100% pass-through of overcharges. Pet. App. A14. Thus, the concern expressed by the United States in its *amicus* brief in support of the States' petition for writ of certiorari – that complexity may result if parties are allowed to litigate the extent of any pass-on – does not apply in this case.

⁹ This type of "aggregate" damages proof is specifically authorized in a *parens patriae* case by 15 U.S.C. § 15d.

¹⁰ The United States, in its *amicus* brief in support of the States' petition for writ of certiorari, questioned whether allowing both direct and indirect purchasers to pursue their

(Continued on following page)

The unreasonably complex proof that the Court confronted in *Illinois Brick* would arise only if the residential consumers and the utilities were seeking apportionment of the *same* damages – the overcharges. But in the present case, where the overcharges were passed on in their entirety, this problem does not exist. The attorneys general can pursue the damages that the consumers alone sustained, and the utilities can seek their lost profits. With no overlap of damages, there is no problem of apportionment.

For the same reasons, there is no risk here of the duplicative recoveries that the Court feared in *Illinois Brick*. Here both the direct and indirect purchasers are present in the same suit. Under the approach outlined by petitioners, all will remain as plaintiffs – the utilities to recover their lost sales, and the consumers to recover the overcharges they paid. The different classes of plaintiffs will be seeking different – not duplicative – damages.¹¹

(Continued from previous page)

respective damage claims could present difficulty regarding "whether lost sales are attributable to higher charges or some other factor." These issues, however, are part of *every* case where lost profits are alleged; no additional complexity is introduced by allowing indirect purchasers to pursue the claims for overcharges.

¹¹ Moreover, unlike *Illinois Brick*, where allegedly price-fixed concrete blocks were incorporated into buildings after passing through several levels of distribution, here a single product, natural gas, passed unchanged from the producers to the ultimate consumers. The *Illinois Brick* facts required a complex economic analysis of how much the price of concrete block affected the ultimate price of the buildings. In the present case, of course, no such analysis is necessary.

These precise points were made by the *en banc* Seventh Circuit in *Illinois ex rel. Hartigan v. Panhandle Eastern Pipe Line Co.*, 852 F.2d 891 (7th Cir.), *cert. denied*, 109 S.Ct. 543 (1988). In an opinion written by Judge Richard Posner, the Seventh Circuit addressed the identical issue presented here: whether a 100% pass-through of overcharges by a regulated utility should be recognized as an exception to the *Illinois Brick* direct-purchaser rule. In holding that it should, the Seventh Circuit disposed of the argument that allowing indirect purchasers to sue would appreciably increase the suit's complexity:

Thus there can be no problem of apportionment in the suit on behalf of the residential customers. Those customers are not seeking damages for gas they did not buy, and the damages for the gas they did buy can simply be read off from their gas bills.

* * *

Since [the utility] can sue for its lost sales . . . , there can be more than one set of plaintiffs. But each set will be suing in respect of different sales – not, as in *Illinois Brick*, the same sales.

852 F.2d at 897.

Judge Posner's analysis applies equally to the present facts. Here too the consumers' damages can be determined from their gas bills, or, even more simply, from the utilities' public filings. The Court's concerns in *Illinois Brick* do not arise.

This case does not require the application of complex economic theory. Nor does it rest on dubious assumptions about hypothetical pricing decisions. The indirect purchasers' claims should be restored.

2. Recognizing The Residential Consumers' Claims Will Promote Antitrust Enforcement And Ensure Compensation For Those Parties Actually Injured.

The Court in *Illinois Brick* had two additional concerns: encouraging antitrust enforcement and ensuring that injured parties receive compensation. Unlike *Illinois Brick*, in the present case both interests can be furthered only by allowing the *indirect* rather than the direct purchasers to sue for the antitrust overcharges.

The state attorneys general, as representatives of the consumers actually sustaining damages, are the most reliable parties to pursue the overcharges on the present facts. The utilities clearly are not. Of the fifty regulated gas utilities in the relevant service areas in Kansas and Missouri, only *two* – KPL and UtiliCorp – chose to bring suit here. UtiliCorp dismissed its complaint in 1986, less than a year after filing suit. Although UtiliCorp later refiled, defendants maintain that UtiliCorp's claims (and thus, if the direct-purchaser rule is applied, the claims of more than 40,000 customers) are time-barred. The failure of the remaining forty-eight utilities to bring suit *at all* means that currently at least 50,000 *more* residential consumers are unrepresented and will remain so if the *parens patriae* claims are not allowed to proceed.

The Seventh Circuit in *Panhandle Eastern* recognized that in the regulated utility industry, the utilities, unlike most direct purchasers, have little incentive to sue. As the court noted:

The public utility has less to gain from suit than the direct purchaser in the case of the purely

private contract. The public utility commission may force the utility to pass on to the consumers any and all damages that the utility recovers, and if it does utilities will have no incentive to sue because they will have nothing to gain from suit.

* * *

[The utility] seems a most reluctant suitor, and why shouldn't it be? It has little or nothing to gain by such a suit.

852 F.2d at 895.

On balance, the utilities operating in Kansas and Missouri also seem reluctant to sue. Even KPL, the only utility plaintiff that did sue promptly, cannot be said to have sufficient incentive to continue prosecuting this case vigorously.¹² The Tenth Circuit suggested that KPL might ultimately be required by regulators to pass on any recovered overcharges to its customers. Pet. App. All. If so, what incentive does it have to pursue these claims forcefully to a conclusion? How long can KPL's efforts to obtain damages on behalf of others be reconciled with its obligations to its own shareholders?

If, on the other hand, KPL is attempting to keep all overcharges for itself, it would have incentive to sue, but any overcharge it recovered would be a complete wind-fall. The Court's announced goal in *Illinois Brick* of providing compensation to injured parties would be wholly

¹² KPL's motivation is questionable in part because of its need to maintain good relationships with the very suppliers it has sued. See *Illinois Brick*, 431 U.S. at 746.

frustrated.¹³ Allowing the utilities that absorbed *none* of the overcharge to sue, while denying this same right to the consumers who sustained *all* of it, does nothing to promote compensation. The *Illinois Brick* direct-purchaser rule, which has never been more than an exception to the general rule of antitrust standing, cannot sensibly be extended here to deprive the only truly-injured parties of their claims.

The position advanced by the States is consistent with the flexible, common-sense approach adopted by the Court in *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982). There plaintiff was a subscriber, through her employer, to a health plan that denied her claim. Despite the fact that plaintiff was only an indirect purchaser of the health plan's services, she was allowed to maintain an antitrust suit against the plan. In holding that the direct-purchaser rule of *Illinois Brick* did not apply, the Court recognized that "it is not the employer as purchaser, but its employees as subscribers, who are out of pocket as a consequence of the plan's failure to pay benefits." 457 U.S. at 475. The Court recognized that under these circumstances:

[O]ur cautious approach to speculative, abstract or impractical damages theories has no application. . . . The nature of [plaintiff's] injury is easily

¹³ This is not a case such as *Illinois Brick*, where a great number of potential plaintiffs, including the direct purchasers themselves, absorbed part of the overcharge. While in the *Illinois Brick* setting, allowing only direct purchasers to sue clearly compensates *some* injured parties, and arguably leaves uncompensated only the more remote purchasers, allowing the utilities to sue in the present case would not compensate *any* party who bore the overcharges.

stated: As the result of an unlawful boycott, Blue Shield failed to pay the cost she incurred for the services of a psychologist. Her damages were fixed by the plan contract and, as the Court of Appeals observed, they could be "ascertained to the penny."

Id. at 475 n.11.

The present case is no different. It is the residential consumers who have suffered "tangible economic injury," *id.*, and it is they who should be allowed to sue.

The Court also suggested in *Illinois Brick* that the potentially small stake of indirect purchasers may impede antitrust enforcement if they are granted standing to sue. But the *parens patriae* mechanism of 15 U.S.C. § 15c is designed to remedy that exact concern. See H.R. No. 94-499, 94th Cong., 2d Sess. 6-8, reprinted in 1976 U.S. Code Cong. & Ad. News 2572, 2575-78. Certainly the huge aggregate claim of residential consumers in this case has given the attorneys general ample incentive to sue. See 15 U.S.C. § 15d.

The goals of antitrust enforcement and compensation to injured parties can only be achieved by allowing the *parens patriae* claims to proceed.

B. The Regulated Cost-Plus Pricing Arrangement In This Case Satisfies The Exception To The Direct-Purchaser Rule Suggested By The Court In *Hanover Shoe*, *Illinois Brick* And *ARC America*.

Not only does the present case satisfy the underlying concerns of *Illinois Brick*, it also fits within the cost-plus

exception suggested in *Hanover Shoe*, *Illinois Brick* and *ARC America*.

In *Hanover Shoe*, the Court noted that "there might be" an exception to the direct-purchaser rule, "for instance, where an overcharged buyer has a pre-existing 'cost-plus' contract, thus making it easy to prove that he has not been damaged." 392 U.S. at 494. In *Illinois Brick*, the Court elaborated on what it termed the *Hanover Shoe* "example" of a "pre-existing cost-plus contract":

In such a situation the purchaser is insulated from any decrease in its sales as a result of attempting to pass on the overcharge, because its customer is committed to buying a fixed quantity regardless of price. The effect of the overcharge is essentially determined in advance, without reference to the interaction of supply and demand that complicates the determination in the general case. The competitive bidding process by which the concrete block involved in this case was incorporated into masonry structures and then into entire buildings can hardly be said to circumvent complex market interactions as would a cost-plus contract.

431 U.S. 735-36.

In *ARC America*, the most recent case in which the Court discussed this issue, it again noted that "indirect purchasers might be allowed to bring suit in cases in which it would be easy to prove the extent to which the overcharge was passed on to them." 109 S.Ct. at 1666 n.6.

The Court's primary concern in these cases appears to have been avoiding complex problems of proof. Pre-existing cost-plus contracts may avoid these problems, as the Court noted. So do the facts here, where the indirect

purchasers paid the entire overcharge under a classic pre-existing, cost-plus arrangement. If this case does not satisfy the exception to the direct purchaser rule, it is doubtful that any would.

As the Seventh Circuit reasoned in *Panhandle Eastern*, this Court cannot have intended to prescribe a mechanical "fixed-quantity" test for determining whether to allow indirect purchaser suits.¹⁴ The importance of a fixed-quantity contract is to ensure that the direct purchaser has passed on the entire overcharge rather than absorbing part of it to avoid losing customers. *Panhandle Eastern*, 852 F.2d at 895. No fixed-quantity contract is necessary in the present case because the entire overcharge *was* passed on to the consumers. The utilities were required by their tariffs to pass on the full overcharge, and they did so.¹⁵

¹⁴ The Tenth Circuit assumed that a contract for a "fixed-quantity" is essential to any exception to the direct-purchaser rule, erroneously believing that problems of apportionment would otherwise exist between the utilities' lost profits and the consumers' overcharges. But these are wholly separate elements of damage that do not need to be "apportioned." *Panhandle Eastern*, 852 F.2d at 897. In this case, as in *Panhandle Eastern*, there is no need to engage in the complex task of trying to apportion the *same* damages between the utilities and the consumers.

¹⁵ This result is consistent with economic theory. As Judge Posner noted, in the context of regulated public utilities, where prices charged consumers are generally lower than they would be in the absence of regulation, and where residential consumers have no ready alternative source of fuel, one would expect an economically rational utility to pass on the full amount of the overcharge. 852 F.2d at 896. "The utility can force the whole of the cost increase through to its residential customers without sacrificing any profits, and *did so*." *Id.* at 898 (emphasis original).

The hypothetical result that this Court expected to occur under the "pre-existing cost-plus" contract of *Hanover Shoe* and *Illinois Brick* – a 100% pass-through of incurred overcharges – already exists on the present facts. There is no ground for denying the injured consumers their right to sue.

II. THE INDIRECT PURCHASERS' CLAIMS SHOULD BE RECOGNIZED HERE FOR THE SEPARATE REASON THAT, UNLIKE *ILLINOIS BRICK*, THIS CASE IS BROUGHT BY STATE ATTORNEYS GENERAL AS *PARENS PATRIAE*

The Court should reverse the Tenth Circuit's judgment for the separate reason that the States' *parens patriae* actions are authorized by Title III of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 15c (the "Act"). The language and legislative history of the Act make plain that state attorneys general have standing to bring antitrust suits on behalf of "natural persons" injured by antitrust violations, regardless of whether those persons are direct or indirect purchasers.

The full extent of the *parens patriae* authority conferred by the Hart-Scott-Rodino Act has never been addressed by the Court. In *Illinois Brick*, the Court rejected the argument that the Act evinces a congressional intent to authorize *all* suits brought by indirect purchasers under Section 4 of the Clayton Act, 15 U.S.C. § 15.¹⁶ 431 U.S. at 733 n.14; *but see* 431 U.S. at 756-58 (Brennan, J.,

¹⁶ The Court suggested that legislators' views in 1976 cannot possibly have affected general standing principles under Section 4 of the Clayton Act, which was enacted in 1914. 431 U.S. at 733 n.14.

dissenting). But *Illinois Brick* was not a *parens patriae* case.¹⁷ It therefore did not directly address the issue now before the Court: whether the Act grants independent authority to state attorneys general to bring suit in their *parens patriae* capacity on behalf of indirect purchasers.

Title III, Section 301 of the Hart-Scott-Rodino Act, 15 U.S.C. § 15c(a)(1), provides in pertinent part:

Any attorney general of a State may bring a civil action in the name of such State as *parens patriae* on behalf of natural persons residing in such State . . . to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of the Sections 1 to 7 of this title.

The plain language of the Act thus authorizes the precise action brought in this case.

The Act cannot sensibly be read as authorizing *parens patriae* actions only on behalf of direct purchasers. The clear purpose of the Act is to protect *consumers*,¹⁸ who are far more likely to be *indirect* rather than direct purchasers. See Kintner, Griffin & Goldston, *The Hart-Scott-Rodino Antitrust Improvements Act of 1976: An Analysis*, 46

¹⁷ In *Illinois Brick*, the State of Illinois was suing for itself and its political subdivisions, not in a *parens patriae* capacity. The observations of the *Illinois Brick* majority regarding the Act were thus not directed at suits brought under 15 U.S.C. § 15c, but at indirect purchaser suits brought under Section 4 of the Clayton Act, 15 U.S.C. § 15.

¹⁸ The Act's legislative history confirms that its purpose is to allow "State attorneys general to act as *consumer* advocates in the enforcement process. . . ." See H.R. No. 94-499, 94th Cong., 2d Sess. 8, reprinted in 1976 U.S. Code Cong. & Ad. News 2572, 2578 (emphasis added).

Geo. Wash. L. Rev. 1, 23 (1977). The Court has recognized that protecting consumers was a central goal of the Act. In *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 n.7 (1979), the Court expressly noted that "[t]he text and legislative history of this statute make clear that in 1976 Congress believed that consumers have a cause of action under § 4, which the statute authorizes the states to assert in a *parens patriae* capacity."

When debating the Act, Congress recognized that in order to adequately protect consumers from antitrust violators, the "technical and procedural" barriers erected by such concepts as "standing" and "privity" would have to be rejected:

"A direct cause of action is granted the States to avoid the inequities and inconsistencies of restrictive judicial interpretations. . . . Section 4C is intended to assure that consumers are not precluded from the opportunity of proving the amount of their damage and to avoid problems with respect to manageability [of class actions], *standing, privity, target area, remoteness, and the like.*"

Illinois Brick, 431 U.S. 720, 757 (Brennan, J., dissenting) (quoting S. Rep. No. 94-803, 94th Cong., 2d Sess. 42 (1976) (emphasis supplied by Court)).

As Justice Brennan further noted, Representative Rodino, one of the Act's sponsors, stated during the House debates:

"[A]ssuming the State attorney general proves a violation, and proves that an overcharge was 'passed on' to the consumers, injuring them 'in their property'; that is, their pocketbooks - recoveries are authorized by the compromise bill

whether or not the consumers purchased directly from the price fixer, or indirectly, from intermediaries, retailers, or middlemen. The technical and procedural argument that consumers have no 'standing' whenever they are not 'in privity' with the price fixer, and have not purchased directly from him, is rejected by the compromise bill. Opinions relying on this procedural technicality . . . are squarely rejected by the compromise bill."

Id. at 757-58 (quoting 122 Cong. Rec. H10295 (daily ed. Sept. 16, 1976)) (emphasis added).

These statements make plain that Congress intended to authorize state attorneys general to sue as *parens patriae* on behalf of indirect purchaser consumers. "It is difficult to see how Congress could have expressed itself more clearly." 431 U.S. at 758 (Brennan, J., dissenting). While the passage of the Act may not have affected antitrust standing generally, surely Congress intended to -- and did -- authorize *parens patriae* actions on behalf of indirect purchasers.¹⁹

¹⁹ The majority in *Illinois Brick* found it significant that some members of Congress apparently believed the *parens patriae* provisions "create no new substantive liability." See 431 U.S. at 733 n.14. But such statements should have no bearing on the right of state attorneys general to sue on behalf of indirect purchasers. When these statements were made in 1976, Congress clearly thought that indirect purchaser suits *could* be brought. H.R. 94-499 at 6 n.4; see also *Illinois Brick*, 431 U.S. at 733 n.14. Because the Act was based on the assumption that indirect purchaser suits were allowed, "Congress need not have intended to create a new remedy, since one already existed." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 378 (1982).

Application of the *Illinois Brick* direct-purchaser rule would undermine the clear language and legislative history of the Act. As Congress recognized, claims of consumers against manufacturers or distributors are by their very nature indirect. The *parens patriae* claims here were specifically authorized by Congress in 1976. Those claims should be reinstated.

CONCLUSION

The judgment of the Tenth Circuit should be reversed and the *parens patriae* claims of the state attorneys general should be allowed to proceed.

Respectfully submitted,

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